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WARRANTIES IMPLIED IN SALES OF PERSONAL PROPERTY IN THE UNITED STATES AND CANADA.

(Continued from March No., page 168.)

IV. GOODS SOLD TO ORDER.

WHERE goods are to be made or supplied to order, there is always an implied warranty that they are reasonably fit for the ordinary use to which such goods are usually put, and that they are suitable for the special use intended by the purchaser, provided that it be communicated to the vendor when the order is given to him.

Thus, in *Port Carbon Iron Co. v. Groves*, 68 Penn. St. 149, READ, J., said, quoting 1 Pars. on Cont. 586, "If a thing be ordered of the manufacturer for a special purpose, and it be supplied and sold for that purpose, there is an implied warranty that it is fit for that purpose. This principle has been carried very far. It must, however, be limited to cases where a thing is ordered for a special purpose, and not applied to those where a special thing is ordered, although this be intended for a special purpose."

So, in *Spurr v. Albert Mining Co.*, 2 Hannay (N. B.) 361, where the defendants had agreed to supply the plaintiffs with Albert coal from their mines for the purpose of being made into oil, the coal to be a good, clean coal, *Held*, the plaintiffs were

entitled to receive coal of a fair merchantable quality. Here the cases were very elaborately reviewed by RITCHIE, C. J., who also thought the case could be put on the ground of a delivery of a chattel other than that contracted for, and which the purchaser was not bound to take, and not alone on the ground of the implied warranty of fitness. See, also, *Beals v. Olmstead*, 24 Vt. 114; *Wolcott v. Mount*, 7 Vroom 262. The same principle is further illustrated by some of the cases about to be cited in the next subdivision.

#### V. SALE OF GOODS FOR SPECIAL USE.

##### (a) *Vendor's skill relied upon.*

It has always been held that where a man buys an article for a special purpose, and makes known the intended use of the same to the vendor, there is an implied warranty that the article is fit for such use, provided the vendor's knowledge or skill is relied upon, and the vendee does not buy on his own judgment alone.

In *Beals v. Olmstead*, 24 Vt. 114, defendant sold to plaintiff a lot of hay, and offered to let plaintiff examine the hay in his barn; this the plaintiff declined to do, saying, he could not tell by that, but he wished it for his oxen during spring and summer while at work at a railroad, and defendant said it was good hay, cut around the barn. On removing the covering, plaintiff found the hay was worthless, and was not such as could be cut around the barn. The court said, *inter alia*, "The hay was bought for a particular use, and the defendant knew plaintiff would not buy an inferior article. The sale of the hay then for this particular use, ordinarily implies a certainty that it is fit for the use."

In *Murray v. Smith*, 4 Daly (N. Y.) 277, plaintiff sold certain barrels of lampblack to the defendant, the latter saying he must be very particular in having "black" that would make printers' ink; that black for carriage use would be of no use; that he must have lampblack for printing ink. The plaintiff knew defendant was a manufacturer of printing ink, and he sold the "black" to him for that purpose. The barrels were not examined. *Held*, a warranty that the "black" should be suitable for the manufacture of printing ink.

In *Park v. Morris Axe and Tool Co.*, 4 Lansing (N. Y.) 103, the plaintiffs, manufacturers of steel, at Pittsburgh, sold to the defendants, manufacturers of axes, ten tons of steel. *Held*, the name of the defendants' firm was notice to plaintiffs of the use

intended for the steel. MULLIN, P. J., said: "Parsons, in his work on Contracts, vol. 1, p. 469, says: 'If a thing be ordered of the manufacturer for a special purpose, and it be supplied and sold for that purpose, there is an implied warranty that it is fit for that purpose.' The plaintiffs were *manufacturers*, and the defendants ordered the steel for the purpose of being made into axes. The case is thus brought within the principle asserted by Parsons. \* \* \* The name of defendants' company was 'Axe and Tool Company.' This was notice to plaintiffs of the uses to which the steel was to be applied; and the warranty must be held to be, that the steel would make either axes or tools, &c." See, also, *Freeman v. Clute*, 3 Barb. (N. Y.) 424; *Bartlett v. Hop-pock*, 34 N. Y. 118; *County v. Wade*, 12 Upper Canada Q. B. 614; *Gilson v. Bingham*, 43 Vt. 41; *Brown v. Murphee*, 31 Miss. 91.

In *French v. Vining*, 102 Mass. 132, a party sold hay to plaintiff, on which white lead had been spilt, the plaintiff being ignorant thereof, in consequence of which, when used by plaintiff for feeding his cow, it caused death. On the trial of an action for damages for the death of the cow, the judge ruled that "if the cow died in consequence of eating the paint adhering to the hay sold by the defendant, the plaintiff might recover, although the defendant did not know or believe that there was paint upon the hay; and that the defendant was bound to use the utmost care in separating the paint from the hay so sold." AMES, J.: "It may be perhaps more accurate to say, that, independently of any express and formal stipulation, the relation of the buyer to the seller may be of such a character as to impose a duty upon the seller, differing very little from a warranty. The circumstances attending the sale may be equivalent to a distinct affirmation on his part as to the quality of the thing sold. A grocer, for instance, who sells at retail, may be presumed to have general notion of the uses which his customers will probably make of the articles which they buy of him. If they purchase flour or sugar or other articles of daily domestic use for their families, or grain or meal for their cattle, the act of selling to them under such circumstances is equivalent to an affirmation that the things sold are at least wholesome and reasonably fit for use; and proof that he knew, at the time of the sale, that they were not wholesome and reasonably fit for use, would be enough to sustain an action against him for deceit, if he had not

disclosed the true state of the facts. The buyer has a right to suppose that the thing which he buys, under such circumstances, is what it appears to be, and such purchases are usually made with a reliance upon the supposed skill or actual knowledge of the vendor. In the case at bar, the plaintiff bought the hay in small quantities, and the defendant must be considered as knowing, generally, the kind of use to which it was to be applied. The act of sale, under such circumstances, was equivalent to an express assurance that the hay was suitable for such use."

In *Rodgers et al. v. Niles et al.*, 11 Ohio St. 48, N. & Co. agreed with R. & Co. to manufacture and deliver to the latter, at a future time, three steam boilers to run the engines in their rolling mills. *Held*, that there was an implied promise on the part of the vendors that such boilers should be free from all such defects of material and workmanship, latent or otherwise, as would render them unfit for such use. In this case, SCOTT, J., considered at some length the authorities on this subject. He said: "The general rule of the common law undoubtedly is, that upon an executed sale of specific goods, the vendor will not be held liable for any defects in the quality of the articles sold, in the absence of fraud or express warranty. Where the purchaser is not deceived by any fraudulent representations, and demands no warranty, the law presumes that he depends on his own judgment in the transaction, and applies the maxim '*caveat emptor*.' But to this general rule the requirements of manifest justice have introduced sundry exceptions, of which some are as well settled as the rule itself, while, as to others, the authorities cannot be easily reconciled. We do not propose an investigation of the subject further than is demanded by the case before us. The principal, if not the sole exceptions to the rule, are found in cases where it is evident that the purchaser did not rely on his own judgment of the quality of the article purchased; the circumstances showing that no examination was possible on his part, or the contract being such as to show that the obligation was thrown upon the vendor, as where he agrees to furnish an article for a particular purpose or use. Thus, it is said by Mr. STORY, 'when an examination of goods is, from their nature or situation at the time of the sale impracticable, a warranty will in general be implied that they are merchantable. Thus, if goods be at sea, or not arrived; or if they fill the hold of a ship so that nothing but the surface can be seen; or if they be in

bales, so that an examination of the centre cannot be made without tearing each bale to pieces; the seller will be understood to warrant them merchantable, and of the quality demanded and expected by the buyers:’ Story on Cont., sec. 834.

“It is true that the warranty of merchantable quality has, in several cases, been held to be limited to cases where the examination is *impracticable*, and not merely *inconvenient*: *Hyatt v. Boyle*, 5 Gill & Johns. 110; *Hart v. Wright*, 17 Wend. 267. So, also, the implication of warranty is said not to extend to cases where an examination, though practicable, would be fruitless on account of the latent character of the defects; but only to those cases in which there can be no examination: 1 Pars. on Cont. 466. The same writer, however, says, ‘one exception to the rule of *caveat emptor* springs from the rule itself. For a requirement that the purchaser should ‘beware,’ or should take care to ascertain for himself the quality of the thing he buys, becomes utterly unreasonable, under such circumstances, which make such care impossible.’ The vendor’s liability on an implied warranty, in the case of articles sold for a particular purpose, is illustrated by the cases of *Jones v. Bright*, 5 Bing. 533; *Brown v. Edgington*, 2 M. & G. 279; *Beales v. Olmstead*, 24 Vt. 114; *Brenton v. Davis*, 8 Blackford 317. Other cases have imposed proper limitations on this doctrine, as in the case of *Chanter v. Hopkins*, 4 M. & W. 399, and *Ollivant v. Bagley*, 5 Q. B. 288. In these cases, it was held that where a ‘known and ascertained article’ is ordered and furnished, though intended for a particular use, the liability of the maker and vendor extends only to defects in the materials and workmanship, and not to such as arise from the principle or mode of construction. With respect to the doctrine that a sale made for a particular purpose, implies a warranty that the thing sold shall be fit for that purpose, it is said in 1 Smith’s L. Cas. 250, that ‘the sounder view seems to be that no engagement of this sort can be implied against the vendor, save where the contract is partially or wholly executory; and that in this case it is not in the nature of a warranty but of an implied stipulation, forming part of the substance of the contract.’ And a marked distinction will be found to pervade all the authorities, between an *executed* sale, where the property passes *in presenti*, and an *executory* sale, for the delivery on a future day, of an article not specifically defined or selected at the time. In the latter case, it makes no difference whether the vendor have an

article of the kind on hand, or it is afterward to be procured or manufactured. In neither case can the promisee be compelled to rest satisfied with an inferior article. Though, in the absence of express stipulation, he cannot insist that the article shall be of any special degree of fineness, yet he has a right to insist that it shall be of medium quality or goodness, free from such defects as would render it unmerchantable, or unfit for the purpose for which it is ordinarily used: *Howard v. Hoey*, 23 Wend. 351; *Bown v. Sayles*, 27 Vt. 227; Story on Cont., sec. 834; Broom's Leg. Maxims 614."

(b) *Vendor's skill not relied upon.*

*Dounce v. Dow*, 64 N. Y. 411, is an illustration of goods sold by the vendor who knows the use for which they are intended, but whose skill or peculiar knowledge is not relied upon by the vendee. Here, defendants, manufacturers of agricultural implements, ordered of plaintiffs, dealers, but not manufacturers of pig iron, "double X pipe iron." Plaintiff had no such iron in stock but obtained it of a manufacturer, and shipped to defendants, knowing the use for which it was intended. The iron was found to be "double X pipe iron," but of very poor quality, and when used for casting the castings were worthless. The court held that, as defendants had kept for some time, and used the iron without testing it, they could not rescind, and that as the plaintiff's skill was not relied upon in the purchase there was no implied warranty of fitness for any purpose. MULLIN, J., in the court below 6 T. & C. 653, said: "It is urged by defendants' counsel that upon the facts proved, the court should have found that plaintiff warranted the iron to be suitable for making such castings as defendants were engaged in making. Plaintiff knew the use to which defendants designed to put the iron when delivered, but that furnishes no ground for implying a warranty that the iron was suitable for such use, as he did not manufacture it: *Bartlett v. Hoppock*, 34 N. Y. 118. It is unnecessary to inquire what the rule of law would be if the plaintiff had been the manufacturer of the iron and knew the use to which defendants designed to put it? He is not shown to have skill in iron. He was a mere dealer in the article, purchasing the various brands of iron and selling them by the name by which they were known in the market, and left the purchasers to ascertain the quality for themselves. No

warranty is implied in such a case." The judgment was affirmed on appeal. CHURCH, C. J., delivering the opinion, said: "If the defendants had ordered double X pipe iron, which was tough and soft, and fit for manufacturing agricultural implements, and the plaintiffs had agreed to deliver iron of that quality, a warranty would have been established, which, probably, within the case of *Day v. Pool*, 52 N. Y. 416, would have survived the acceptance of the article. Here, both parties acted in good faith. The defendants ordered simply double X pipe iron, supposing that such iron was always tough and soft. The plaintiff forwarded the iron under the same impression. The iron proved to be brittle and hard, and the question is which party is to bear the loss?" (The opinion of the court below is given in full in *Dounce v. Dow*, 6 Thomp. & Cook, N. Y. S. C. Rep. 653). In the above case, it will be seen the vendor's skill was not relied on, but the vendee bought on his own judgment. See also *Calhoun v. Vechio*, 3 Wash. C. C. 165.

#### VI. IMPLIED WARRANTY OF SOUNDNESS IN SALES OF PROVISIONS.

Mr. Benjamin, after a review of the English cases, in his work on Sales (see p. 666, 3d Amer. ed.), concludes that "it results clearly from these authorities that the responsibility of a victualler, vintner, brewer, butcher or cook, for selling unwholesome food, does not arise out of any contract or implied warranty, but is a responsibility imposed by statute, that they shall make good any *damage caused* by their sale of unwholesome food."

In the United States, in one of the earlier cases: *Bailey v. Nickols*, 2 Root (Conn.) 407 (1796), plaintiffs bought a quantity of barrel beef for exportation, which was also properly marked by the inspector. When the cargo arrived in the West Indies, the beef was found to be tainted and unfit for sale, and the court held "that the defendant, by selling this beef for cargo beef, and asking and receiving a sound price for it, did warrant it to be such as the law prescribed under the denomination of cargo beef, and that it was good and sound." This case, however, it will be seen, really turned on different principles, viz.: that a sound price implies a sound article and the principle of merchantability; and the decision evidently had no special reference in principle to the particular kind of article sold. And later, in *Dean v. Mason*, 4 Conn. Rep. (1822) 428, the doctrine of sound article for a sound price was considered as exploded.

In New York, in the early case of *Van Bracklin v. Fonda*, 12 Johns. (N. Y.) 468 (1815), on an action for damages for the delivery of diseased beef—the animal having been slaughtered for fear she should die a natural death—for domestic use, the court said: “In 3 Blackst. Com., it is stated as a sound and elementary proposition, that in contracts for provisions, it is always implied that they are wholesome; and if they are not, case lies to recover damages for the deceit. In the sale of provisions for *domestic use*, the vendor is bound to know that they are sound and wholesome at his peril. This is a principle not only salutary, but necessary to the preservation of health and life.”

In this case, however, there was, as appears, positive evidence of a fraudulent concealment, the animal being killed by the vendor to prevent a natural death from disease. In the more recent case of *Hart v. Wright*, 17 Wend. (N. Y.) 267 (1837), COWEN, J., said of *Van Bracklin v. Fonda*: “I am not aware of any other case in this state wherein a warranty of quality is engrafted on a sound price alone.”

In *Moses v. Mead*, 1 Denio (N. Y.) 378, BRONSON, C. J., considered at some length this proposition: “We are referred,” said he, “to the authority of Blackstone for another exception to the general rule, and it is insisted that on a sale of provisions, there is an implied warranty that they are wholesome. \* \* \* The language of the commentator leaves it somewhat doubtful whether his mind was not upon a *deceit* in the sale, which stands on a different footing from a warranty. If he intended to affirm that the law implies a warranty of soundness in the sale of provisions, the remark is without any support in the English adjudications. \* \* \* The *dictum* of Blackstone has been directly overruled in Massachusetts (*Emerson v. Brigham*, 10 Mass. Rep. 197). \* \* \* The doctrine of Blackstone, with a very important qualification, was approved by the judge who prepared the opinion in *Van Bracklin v. Fonda*, 12 Johns. 468, but that was plainly a case of fraud. The jury found that the beef was unsound and unwholesome, and that the defendant—the seller—knew the animal to be diseased. The case of *Hart v. Wright*, 17 Wend. 267, and 18 Id. 449, arose on a sale of provisions; and one member of the Court of Errors was for implying a warranty of soundness, but that opinion did not prevail. \* \* \* Although the doctrine of Blackstone cannot be supported in its whole extent, I am not disposed to deny that on a sale of provisions for immediate consumption, the vendor may be



held responsible, in some form, for the sound and wholesome condition of the articles which he sells." Here, the provisions were sold as merchandise, and the court said that no implied warranty existed.

In *Burch v. Spencer et al.*, 22 N. Y. 504 (1878), plaintiff's agent bought pork for food, of defendant, who denied the meat to be that of a boar (which is not sold for food as meat, but for lard, &c.). Here, the case again turned on the knowledge of the vendor, and the court held there was a warranty, and added: "I believe that this view of the case is in strict accordance with public policy, which requires that only articles that are sound, wholesome and fit for use shall *knowingly* be sold for food, and that in accordance with such policy, the law implies a warranty in all cases of an executed contract of sale of articles of food that the same are wholesome and fit for use as such, where the vendor has *personal knowledge of the quality and condition of the articles sold, not known to the purchaser, and that the party purchasing intends to use the articles for food, or to sell them to others to be used for the same purpose.*"

In Massachusetts, in *Emerson v. Brigham*, 10 Mass. 197, SEWALL, J., stated the law thus: "Justice BLACKSTONE has classed the cases of deceit and breaches of express warranties in contracts for sales under the head of implied contracts. He says: 'In contracts for provisions it is always implied that they are wholesome; and in a sale with warranty, the law annexes a tacit contract, that if the article be not as warranted, compensation shall be made to the buyer; \* \* \* or if they be in any shape different from what he represents them to be to the buyer, this artifice shall be equivalent to an express warranty, and the vendor is answerable for their goodness.' It is obvious that, in this very general classification, the details and examples are very imperfectly introduced and with some inaccuracy. It is not implied in every sale of provisions, that they are wholesome, any more than it is in sales of other articles, where proof of a distinct affirmation seems in Justice BLACKSTONE'S opinion to be requisite. The contrary may be, and often is, understood between the parties; and it is only when the false representations, to be proved in the one case, may be presumed or taken to be proved in the other that the rule of law applies, and the remedy, as in a case of deceit, is allowed. An artifice must be proved to entitle the suffering party to the remedy, equivalent to a

remedy upon an express warranty, as well in the case of provisions as in any other case. The difference is, that in the case of provisions, the artifice is proved, when a victualler sells meat as fresh to his customers at a sound price, which, at the time, was stale and defective or unwholesome from the state in which the animal died. For, in the nature of the bargain, the very offer to sell is a representation or affirmation of the soundness of the article when nothing to the contrary is expressly stated; and his knowledge of the falsehood in this representation is also to be presumed from the nature and duties of his calling and trade. But, cases may be supposed where, this presumption being repelled by contrary evidence, the seller would not be liable; as where a different representation was made; and this is proved directly, or is necessarily to be presumed from the nature of the article, the state of the market, or other circumstances. Indeed there is nothing to be inferred in a sale of provisions, which may not be inferred to a like purpose in other cases; where the calling or profession of the seller, the soundness of the price, and nature of the article sold, have been made the ground of decision." In *Winsor v. Lombard*, 18 Pick. (Mass.) 61, SHAW, C. J., observed: "It is supposed that a different rule applies to the case of all provisions from that applicable to other merchandise. This matter is well explained by Mr. Justice SEWALL, in *Emerson v. Brigham*, *supra*."

In *Howard v. Emerson*, 110 Mass. 320 (1872), a live cow was sold to a retail butcher, for use as food, and it was held there was no implied warranty that the cow was fit for food. MORTON, J., in speaking of the exception, to the general rule contended for, in the case of an article sold for domestic use, said: "But we think that this exception, if established, does not extend beyond the case of a dealer who sells provisions directly to the consumer for domestic use. In such cases it may be reasonable to infer a tacit understanding which enters into the contract, that the provisions are sound. The relation of the buyer to the seller, and the circumstances of the sale, may raise the presumption that the seller impliedly represents them to be sound. But the same reasons are not applicable to the case of one dealer selling to another dealer."

In *Osgood v. Lewis*, 2 Har. & G. (Md.) 495, there is a dictum that in a sale of provisions there is a warranty.

In Pennsylvania, in *McNaughton v. Joy*, 1 Weekly Notes of Cases (Phila.) 470, the Court of Common Pleas held, on a sale

of butter and potatoes for table use, there was always an implied warranty that they were fit for the purpose for which they were sold.

In *Ryder v. Neitge*, 21 Minn. 70, the court said, the warranty, if implied at all, is implied only where the provisions are sold for consumption, or immediate use by the vendee, and not as merchandise, as in this case. And in *Goad v. Johnson*, 6 Heisk. (Tenn.) 340 (1871), NICHOLSON, C. J., after quoting, approvingly, Mr. Benjamin's conclusion on this subject, in his work on Sales, referred to above, repudiated the idea that the sale of provisions affords any exception to the general rule of *caveat emptor* in sales, and said: "The case of selling unwholesome provisions for consumption, therefore, furnishes no exception to the rule that where there is no deceit or fraud on the part of the seller, and where the buyer inspects and buys upon his own judgment, he buys subject to the rule of *caveat emptor*, even if there were a latent defect in the chattel sold, equally unknown to seller and buyer, and hidden from detection by either."

In *Humphrey v. Comline*, 8 Blackf. (Ind.), 516, it was held that in a sale of molasses in barrels, at the market price, to a grocer, there was no implied warranty, the molasses was fit for the purpose purchased, the barrels being present at the time of the sale, and subject to inspection.

In *Hyland v. Sherman*, 2 E. D. Smith 238, WOODRUFF, J., said: "As to the supposed warranty that the articles being provisions, they were suitable for food, if it be true that any such warranty is implied on a sale of food for domestic use, it has been distinctly held that there is no such warranty when the provisions are sold as merchandise, to be sold again by the buyer: *Moses v. Mead*, *supra*."

In *Hoover v. Peters*, 18 Mich. 51, it was, however, held that in a sale of provisions for immediate domestic use, a warranty of soundness is implied. Here the court were not unanimous in their opinion, and besides the court below was reversed.

Upon a review of these cases, we are led to conclude that there is no good reason why, in a sale of provisions, the vendor should be held to warrant the soundness of his goods any more than in any other contract of sale, nor do any of the cases, we have been able to find, except the cases of *McNaughton v. Joy*, *supra*, and *Hoover v. Peters*, *supra*, which are put on the supposed superior

knowledge of the vendor, hold such a doctrine; though the *dicta* of some judges, perhaps, point that way. It is said by the annotator to the third edition of Benjamin on Sales, at page 665, that "it has been held, that there is a very plain distinction between selling provisions for 'domestic use,' and selling them as articles of merchandise to one who does not intend to use them for immediate consumption but to sell again; in the latter case there is no implied warranty." None of the cases he cites for this proposition, however, in our opinion, bear him out, though certainly the *dicta* of individual judges are to that effect, while some of the cases cited by him even repudiate that doctrine altogether. In those cases we have reviewed, in which a warranty has been implied, the element of fraud, or superior knowledge on the part of the vendor, has always been present. Circumstances may, of course, occur, where a warranty may be presumed, from the nature of the sale, or the surrounding circumstances of the parties at the time of the sale, but we have found no case with the exception of *McNaughton v. Joy*, *supra*, and *Hoover v. Peters*, *supra*, which has flatly decided that in a sale of provisions for domestic use or otherwise, the law will imply a warranty of soundness, different from what would be implied in the case of a sale of any other article.

#### VII. WARRANTY IMPLIED FROM A USAGE OF TRADE.

A warranty is often implied from some familiar usage of the trade prevalent at the place where the parties deal; such usage, however, must be shown to be in all respects reasonable, and have, otherwise, the necessary qualifications of a valid usage, to be binding upon the parties. The following cases are illustrations of usages that have been held valid:—

In *Clark v. Baker*, 11 Metc. (Mass.) 186, it was held that evidence of a usage was admissible to prove that, in the port of Boston, where a cargo of corn is sold in bulk, lying in the vessel in which it was imported, and the sale is made under a warranty, the purchaser receives it and retains so much as corresponds with the contract, and rejects the residue, which thereupon is vested in the seller. DEWEY, J., remarked: "The extent to which local usages of trade are to be applied, in the construction and effect to be given to contracts, is a matter by no means free from difficulty. These usages differ essentially from those more general customs which are known and exist as part of the general law of the land,

and which are observed and applied without being offered in each particular case. These local usages may be of comparatively recent origin, and may be limited to a single city or village; and yet, if reasonable in their provisions, and so generally adopted by those concerned in any peculiar branch of business, as to authorize the presumption that they are known by those who are dealing as vendors and vendees in that branch of trade or business, the dealings and contracts of such persons are considered to have been made with reference to such usages, and to be governed thereby. Learned jurists have often expressed their regret at the extension of this species of evidence, and especially that as to usage, of a local and limited character, as impairing, in some degree, the symmetry of the law, and tending to uncertainty and embarrassment in the administration of justice, and also liable to the serious objection, that the knowledge, by the party to be affected by it, of the existence of such usage, is a mere legal presumption which may often be unfounded in reality, although such usage is established by what is deemed competent legal evidence. Notwithstanding these objections, such local usages have been held admissible by the judicial tribunals, as competent to explain and qualify the contract, and give to it an effect materially different from that which the general law would have done, in the absence of all evidence of such usage."

In *Snowden v. Warder*, 3 Rawle (Penn.) 101, the court admitted evidence of a usage at Philadelphia, that, on the purchase and sale of cotton, the vendor shall answer the vendee for any latent defect in the article sold, though there be no fraud, and in the absence of any warranty.

In *Boorman et al. v. Jenkins*, 12 Wend. (N. Y.) 566, it was held that evidence of a usage was admissible to show that, in a certain locality, a sale of packed cotton is a sale by sample, though the written evidence of the sale was silent in that respect; usage being parol evidence admissible to explain, though not to contradict, the written instrument.

In *Fatman v. Thompson*, 2 Disney (Cinn.) 482, evidence was offered to show an established usage among Cincinnati tobacco dealers, to warrant, in all sales of a particular kind of tobacco, the article as sound and merchantable for four months after the sale, and on proof of its being the contrary, the seller to make a reduction in the price. *Held*, a reasonable usage. STORER, J., said: "Whenever a usage of any particular trade or place is established

to exist, the law, as we understand it, implies on the part of him 'who contracts or employs another to contract for him, upon a matter to which such usage or custom has reference, a promise for the benefit of the other party, in conformity with such usage; provided there be no express stipulation between them which is inconsistent with such usage.' \* \* \* Its reasonableness must depend in a great measure upon the place where the contract is made, as well as upon the nature of the commodity sold. When once established, it becomes the rule of the trade, and the dealer in the article sold cannot protect himself by asserting his ignorance of the usage."

In the following cases, the usages of the place or trade were held, not reasonable, and therefore illegal:

In *Dodd v. Farlaw*, 11 Allen (Mass.) 426, the court held, a usage that gives a broker an implied authority to warrant goods sold by him to be of a merchantable quality is inadmissible. BIGELOW, C. J., remarked: "It is liable to the grave objection that it is unreasonable, and so contrary to the ordinary rules by which the relation of principal and agent is regulated, that it cannot be presumed to have been in contemplation of a vendor in employing a broker to make a sale of merchandise. Even if the usage was known to the vendor, he would have a right to disregard it, and to disavow a contract made in conformity to it."

In *Wetherill v. Neilson*, 20 Penn. St. 448, an offer was made to prove the existence of a custom of the trade at the port of Philadelphia, that soda ash is sold upon the representation of the seller as to the percentage of alkali contained in it, and without warranty or sample. Held, inadmissible. LOWRIE, J., said: "As to the offer to prove a special custom in Philadelphia as to the special article of soda, if it means anything at all, it means that, when people in Philadelphia are selling soda, common English words of representation become words of warranty. It must be conceded that such evidence has been admitted (3 Rawle 101); but never without serious doubts, and we have found ourselves unable to follow the example. See *Coxe v. Heisley*, 7 Harris (Penn.) 243." This case, it must be admitted, virtually overrules that of *Snowden v. Warder*, *supra*, in which an able opinion was delivered by Ross, J. It may, however, be remarked with reference to *Wetherill v. Neilson*, *supra*, that the decision has been much questioned.

In *Barnard v. Kellogg*, 10 Wallace (U. S.) 383, Barnard, residing in Boston, placed a lot of wool, received from a shipper in Buenos Ayres, in the hands of certain wool brokers to sell, with instructions not to sell unless the purchaser came to Boston to examine the wool for himself. The brokers sent to Kellogg & Co., at Hartford, Connecticut, samples of the lots of wool, and Kellogg wrote in reply, naming a price, and offering to take the wool, if equal to sample. The brokers accepted this offer, provided the dealers in Hartford examined the wool, and stated whether they would take it or not. Kellogg acceded to this condition, and examined four bales in the brokers' office, and was offered an opportunity to examine the whole, but this he declined to do. Afterwards, it was discovered that the cotton was deceitfully packed with rags and damaged wool, of which, however, Barnard was ignorant. On the trial of the case, without a jury, the court held this not to be a sale by sample; and found that there was a custom of merchants in Boston and New York, where such goods are sold, by virtue of which a warranty is implied that the same are not deceitfully packed, which custom the court held valid, and binding on the parties to the sale. On appeal, this was reversed, STRONG and BRADLEY, JJ., dissenting. DAVIS, J., said: "It is apparent, that the usage in question was inconsistent with the contract which the parties chose to make for themselves, and contrary to the wise rule of law governing the sales of personal property. It introduced a new element into their contract, and added to it a warranty, which the law did not raise, nor the parties intend it to contain. The parties negotiated on the basis of *caveat emptor*, and contracted accordingly: see *Whitmore v. South Boston Iron Co.*, 2 Allen 52."

#### VIII. SALE BY SAMPLE.

##### (a) General rule.

Another very important and common warranty, that the law implies, is in a sale by sample, where the vendor warrants the mass or bulk of the goods sold to be equal to the sample. This rule is almost universal. See *Hargous v. Stone*, 1 Selden 73; *Bradford v. Manly*, 13 Mass. 139; *Borrekins v. Bevan*, 3 Rawle (Penn.) 37; *Leonard v. Fowler*, 44 N. Y. 289; *Brower v. Lewis*, 19 Barb. (N. Y.) 574; *Magee v. Billingsley*, 3 Ala. 679; *Gallagher v. Waring*, 9 Wend. 20.

In Pennsylvania, however, the existing rule seems to be different, and the courts at present hold, that in a sale by sample, the vendor is not bound to deliver goods in bulk equal in quality to the sample shown, but only goods of the same *kind* or *species*; all gradations in quality being at the risk of the purchaser.

Thus, in *Fraley v. Bispham*, 10 Penn. St. 320, where it appeared that a sale of fifty hogsheads of superior sweet-scented Kentucky leaf tobacco was made by sample, the court held that the terms of the sale were satisfied by the delivery of Kentucky leaf tobacco, not equal to the sample, but ill-flavored, rotten, heated, unsaleable, and not sweet-scented. The same principle was laid down in the recent case of *Boyd v. Wilson*, 83 Penn. St. 319 (1877). Here, a corn broker effected a sale for A. of 850 cases of "king's brand" of canned corn to B., who had first been furnished with a sample of three cans for trial, and had found them in a good condition. After the delivery, the corn was found to be greasy and sour, and part unfit for use. It was proved that the only absolute test of the soundness of canned corn, without opening the cans, is the swelling and bursting of the cans. There were no swelled cans, and there was no evidence of fraud in the transaction. On a suit by the vendor on a note given by the vendee, the court below held, "a sale by sample is not a warranty," and a verdict and judgment were entered for the plaintiff. On appeal, the judgment was affirmed. SHARSWOOD, J., dissenting. AGNEW, C. J., in pronouncing the opinion of the court, said: "If we trace the law of this state through the following cases, we shall find that a sale of chattels by the production of a sample, but without fraud, or circumstances to fix the character of the sample as a standard of quality, is not attended by any implied warranty of the quality. The sample, under such circumstances, pure and simple, becomes a guaranty only that the articles to be delivered shall follow its kind and be simply merchantable. These are the cases referred to: *Borrekins v. Bevan*, 3 Rawle 23; *Jennings v. Gratz*, Id. 168; *Kirk v. Nice*, 2 Watts 367; *McFarland v. Newman*, 9 Id. 55; *Fraley v. Bispham*, 10 Barr 320; *Carson et al. v. Baillie*, 7 Harris 375; *Wetherill v. Neilson*, 8 Id. 448; *Eagen v. Call*, 10 Casey 236; *Weimer v. Clement*, 1 Wright 147; *Whitaker v. Eastwick*, 25 P. F. Smith 229. Such, precisely, was the state of this case. The broker, going on a business round, produced a can of the corn, and



exhibited it to the defendants, and they afterwards asked to see others, which they opened and examined and proved by looking for themselves. On the following day they made an offer for the lot, which was accepted. There was no fraud and no warranty to show that the parties dealt upon the basis of a quality to be precisely such as the cans exhibited contained. The evidence also showed that such cans are hermetically sealed to preserve the corn, and are thus bought and sold, and that the only true indication of their being spoiled is the bulging of the cans produced by fermentation \* \* \* which swell out the head. It is also shown that these cans were not bulged. The court charged, if there were fraud in the selection of the cans as a means of imposition, or they were of a particular lot, and the seller delivered from a different lot, it would be evidence of fraud. But the court saw no evidence in the case of either fraud or warranty, and under these circumstances charged that a sale by sample was not in itself a warranty of the quality of the corn. This language is too broad for all cases, but under these facts it seems to us there was no error in the instruction. It was said of a general sale without circumstances. The seller did not agree or say that the remainder should be of the same quality as the sample, and the purchaser did not order the corn to be delivered to be of the same quality as the sample; nothing was said or done on either side to give character to the sample cans as a standard of the quality. This being the nature of the sale, the sample became a standard only of the kind, and the goods were simply merchantable. So long as the commodity is saleable, its different degrees of quality from good to bad are not the subject of an implied warranty; if it be wholly unmarketable, such as cannot be considered merchantable, probably a different conclusion would be reached, because an unmarketable article is substantially different in kind from one that is saleable in the market."

This decision has always, we believe, been looked upon by the Philadelphia bar with great doubt, and it is also to be observed that the learned jurist, Justice SHARSWOOD, the late Chief Justice of the court, dissented, and WILLIAMS, J., was absent during the argument.

(b) *Production of Sample not necessarily sale by Sample.*

While a sale by sample usually constitutes a warranty, that the

bulk of the article sold is equal to the sample, it must clearly appear that the sale is in reality a sale by sample; for the mere production of the sample is not always a sale by sample.

Thus in, *Salisbury v. Stainer*, 19 Wend. (N. Y.) 159, it was proved on the trial that defendants wrote plaintiffs a letter, to the effect that "advices received from Trieste this morning by the English packet, quote first quality Ferrara hemp, *same as sold to you*;" that the hemp had been generally represented as of the first quality; that plaintiff examined the hemp in person, by cutting open one bale, being also told by defendants to *examine well for himself*, and that he might so have examined all the hemp. It was contended this was a sale by sample, from which it should be inferred the bulk was equal to the sample. BRONSON, J., said: "This was not a sale by sample; Salisbury was told to examine and did examine the hemp for himself. He inspected the bales, cut open one of them, and was at liberty to open others, had he chosen to do so. If he was not satisfied of the quality and condition of the goods, he should either have proceeded to a further examination or provided against a possible loss by requiring a warranty."

In *Barnard v. Kellogg*, 10 Wallace (U. S.) 383, the facts of which case are fully stated, *supra*, under head VII., of this article, it was held by the court not to be a sale by sample, as the purchaser had examined the goods in part, and might have examined them all if he had so desired. He bought on his own knowledge and at his own risk.

In *Ames v. Jones*, 77 N. Y. 614, D. purchased from producers in the vicinity of Napanee a lot of barley, and in so doing always selected the best and rejected the inferior barley. Subsequently he shipped the barley to Oswego, and the defendant's agent visited the warehouse of D. and was shown a sample of barley, which he took to New York and showed to defendant, who then telegraphed to D. "will give one-twenty for your thirty thousand choice Napanee barley afloat in N. Y.;" who in turn replied, "will accept your offer of one-twenty—can give you ten thousand more if you wish." This was the entire negotiation. D. was apparently ignorant of the delivery of the sample to defendant. In an action for the price, defendants contended this was a sale by sample, and the barley was inferior to the sample. *Held*, not a sale by sample. See also, *Day v. Raguet*, 14 Minn. 273; *Waring v. Mason*, 18

Wend. (N. Y.) 425; *Jones v. Wasson*, 59 Tenn. Rep. 211; *Atwater v. Clancy*, 107 Mass. 369.

In *Beirne v. Dord*, 1 Selden (N. Y.) 95, blankets in bales were sold by the defendant to the plaintiff in the former's shop. When the purchase was made, defendant exhibited to the purchaser several pairs of blankets, which were examined by him and were sound. Nothing was said as to the rest, which it was possible but not convenient to examine. On delivery the blankets were found moth-eaten. Plaintiffs offered to prove the existence of a custom to the effect that sales were usually made in this manner, and that it was not customary to examine the bales at the sale, but if any blankets turned out to be bad, they were either taken back, or an allowance was made for them to the purchaser, which evidence was allowed on exception. The court charged the jury "the evidence was not admitted for the purpose of proving a general usage of trade, forming a part of the contract, or of itself establishing a sale by sample; but it was received as an item of testimony tending to show, in connection with other evidence, that a personal examination of the bulk sold was never contemplated by either party, and that both parties intended to contract upon the sample only, and to make the testimony effective even to this extent, you must be satisfied that there was a general usage in this trade, not merely to sell by exhibiting a sample specimen, but to sell with a mutual understanding that the bulk should be like the bulk in all respects." The court, on appeal, held this charge to be error, on the ground that the custom could not be admissible to control the general rules of law on the subject. In speaking of the dealing by sample in a sale, JEWETT, J., explained the distinction between a sale by sample and a sale where a sample is exhibited. "The mere circumstance," said he "that the seller exhibits a sample at the time of the sale, will not of itself make it a sale by sample, so as to subject the seller to liability on an implied warranty as to the nature and quality of the goods; because it may be exhibited, not as a warranty that the bulk corresponds to it, but merely to enable the purchaser to form a judgment on its kind and quality. If the contract be connected by the circumstances attending the sale, with the sample, and refer to it and it be exhibited as the inducement to the contract, it may be a sale by sample; and then the consequence follows, that the seller warrants the bulk of the goods to correspond with the specimen exhibited as a sample. Whether a sale be a sale

by sample or not, is a question of fact to find from the evidence in each case; and to authorize a jury to find such a contract, the evidence must satisfactorily show that the parties contracted solely in reference to the sample exhibited. That they mutually understood that they were dealing with the sample as an agreement or understanding that the bulk, of the commodity corresponded with it: or, in other words the evidence must be such as to authorize the jury, under all the circumstances of the case, to find that the sale was *intended* by the parties as a sale by sample. \* \* \* That a personal examination of the bulk of the goods by the purchaser at the time of the sale is not practicable or convenient furnishes no sufficient ground of itself to say that the sale is by sample. The want of an opportunity, from whatever cause, for such an examination, is doubtless a strong fact in reference to the question of the character of the sale, whether it is made by sample or not—but it is nevertheless true, that a contract of sale by sample may be made whether such examination be practicable or not, *if the parties so agree*. Where the acts and declarations of the parties in making the contract for the sale of goods are of doubtful construction, evidence that it was impracticable or inconvenient to examine the bulk of the goods would be proper, and in connection with evidence of other circumstances attending the transaction might aid in coming to a correct conclusion in respect to the true character of the contract."

(c) *Implied warranty of merchantability in a sale by Sample.*

Where there is an express warranty this, as a general rule, excludes any idea of an implied warranty.

Thus in *Lanier v. Auld's Ad'mr*, 1 Murphy (N. C.) 138, where the writing in evidence showed that defendant had made a warranty as to the age and soundness of a negro slave, in a sale to the plaintiff, the court held, that this fact excluded any idea of an implied warranty: "We are of opinion that the law will not imply what is not expressed, where there is a formal contract. Evans's Essays 321; Forbes 364; Doug. 654, 6 Term Rep. 606. The express warranty as to soundness and age excludes any implied warranty as to other qualities."

So in *Deming v. Foster*, 42 N. H. 165, where there was a sale of oxen, warranted sound and all right, and which both parties knew were intended for farm work, the court held, *inter alia*, there was no implied warranty of fitness for farm work. BELL, C. J.